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No. 86-990

IN THE
Supreme Court of the United States
October Term, 1986

RCA CORPORATION,
Petitioner,

v.

SAM MALIA and INGRID MALIA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Are an employee's claims, asserted under state law for breach of an oral employment contract for a managerial position and for related tort claims, all of which arose after the employee had left the bargaining unit and none of which were predicated on a collective bargaining agreement, preempted by the Labor Management Relations Act?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... (i)

TABLE OF CONTENTS ..... (iii)

TABLE OF AUTHORITIES ..... (iv)

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD BE DENIED 4

I. THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE PREEMPTION ISSUE 4

II. NO CONFLICT OF AUTHORITY EXISTS AMONG THE CIRCUIT COURTS OF APPEALS 10

III. THE RESULT OF THIS COURT'S REVIEW OF THE DECISION IN *WILLIAMS v. CATERPILLAR TRACTOR CO.*, 786 F.2d 928 (9th Cir. 1986) (No. 86-526), *cert. granted,* 55 U.S.L.W. 3357 (U.S. November 17, 1986), WILL HAVE NO EFFECT ON THIS CASE 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases: Page

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 2, 3, 5, 7

Anderson v. Ford Motor Co.,
803 F.2d 953 (8th Cir. 1986) 13, 14

Bale v. General Telephone Co. of California,
795 F.2d 775 (9th Cir. 1986) 11

Belknap, Inc. v. Hale,
463 U.S. 491 (1983) 7, 8, 9, 12

Bell v. Gas Service Co.,
778 F.2d 512 (8th Cir. 1985) 14

Brown v. Hotel & Restaurant Employees & Bartenders International Union Local 54,
468 U.S. 491 (1984) 9

Carter v. Smith Food King,
765 F.2d 916 (9th Cir. 1985) 11

Eitmann v. New Orleans Public Service, Inc.,
730 F.2d 359 (5th Cir. 1984), *cert. denied,*
469 U.S. 1018 (1984) 11, 12, 13

Evangelista v. Inlandboatmen's Union of the Pacific,
777 F.2d 1390 (9th Cir. 1985) 11

Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25,
430 U.S. 290 (1977) 9

Hillard v. Dobelman,
774 F.2d 886 (8th Cir. 1985) 14

Johnson v. Hussman Corp.,
805 F.2d 795 (8th Cir. 1986) 14

Page

Malia v. RCA Corp.,
794 F.2d 909 (3rd Cir. 1986) 4, 6, 11

Martin v. Associated Truck Lines, Inc.,
801 F.2d 246 (6th Cir. 1986) 11

Mason v. Continental Group, Inc.,
763 F.2d 1219 (11th Cir. 1985), *cert. denied*,
106 S.Ct. 863 (1986) 11

Moore v. General Motors Corp.,
739 F.2d 311 (8th Cir. 1984), *cert. denied*, 471 U.S.
1099, 2320 (1985) 14

Olguin v. Inspiration Consolidated Copper Co.,
740 F.2d 1468 (9th Cir. 1984) 11

Redmon v. Dresser Industries, Inc.,
734 F.2d 633 (11th Cir. 1984) 11

Sears, Roebuck & Co. v. San Diego County District Council of Carpenters
436 U.S. 180 (1978) 9

Truex v. Garrett Freightlines, Inc.,
784 F.2d 1347 (9th Cir. 1985) 11

Williams v. Caterpillar Tractor Co.,
786 F.2d 928 (9th Cir. 1986), *cert. granted*, 55
U.S.L.W. 3357 (U.S. November 17, 1986)
(No. 86-526) 15

Statutory Provisions:

Labor Management Relations (Taft-Hartley) Act § 301,
29 U.S.C. § 185 (1947) 3

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Sam Malia and Ingrid Malia, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision of the Court of Appeals for the Third Circuit in this case. The Court of Appeals' opinion is reported at 794 F.2d 909.[1]

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[1]All citations to the decision below will be made both to the Federal Reporter (Second) and to the Appendix to RCA's Petition for a Writ of Certiorari. The citation format will be as follows: "*Malia v. RCA Corp.*, 794 F.2d 909, ____ (A__)".

STATEMENT OF THE CASE

This Court anticipated the instant case when it observed in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) that: "The full scope of the pre-emptive effect of federal labor-contract law remains to be fleshed out on a case-by-case basis."

From 1966 until April 9, 1984, Sam Malia ("Malia") was an hourly wage employee of RCA Corporation ("RCA"). As such, he was a member of the collective bargaining unit represented by Local 178 of the International Union of Electrical, Radio and Machine Workers. In early April, 1984, while Malia was President of Local 178, the RCA plant manager offered to promote him to inventory coordinator, a managerial position outside the bargaining unit. To induce Malia to accept this promotion, the Plant Manager promised him better pay, increased work hours and overtime, the opportunity for advancement, less stressful working conditions and the option to return to his bargaining unit position if he was not satisfied with his new position.

Malia accepted this proposal and on April 9, 1984, left the bargaining unit to assume his new management position as inventory coordinator. Three weeks later, he requested reinstatement to his former position within the bargaining unit as soon as such a position became available. A position did become available several weeks later but RCA refused to reassign Malia to that position.

In April, 1985, Malia and his wife filed suit in a Pennsylvania state court. The complaint alleged that RCA's refusal to reinstate Malia to his former position in the bargaining unit constituted a breach of an oral contract for employment, fraudulent misrepresentation, tortious interference with a contract, intentional infliction of emotional distress and loss of consortium. RCA removed the case to the United States District Court for the Middle

District of Pennsylvania on the separate grounds of diversity of citizenship and subject matter jurisdiction under § 301 of the Labor Management Relations (Taft-Hartley) Act. 29 U.S.C. § 185 (1947) ("LMRA").

Malia adopts the description of the holdings of the District Court and the Court of Appeals in RCA's Statement of the case, with two exceptions. First, RCA states that the majority of the Court of Appeals "concluded that nothing in the contractual language *specifically* stated whether an employee in Malia's position had a right to reinstatement." (Pet. at 5; emphasis added).[2] This statement suggests, erroneously, that the collective bargaining agreement contained *some* language which, at least generally, provided a right of reinstatement to employees who had left the bargaining unit. In fact, the Court of Appeals found *no* language whatever in the collective bargaining agreement which in any way alluded to circumstances in which a former hourly employee could be reinstated in the bargaining unit. *See* discussion, *infra* at 6.

Secondly, RCA states that "the crux of the holding below is that a unionized employee may negotiate a private employment agreement with respect to his *working conditions* which are not covered by the specific language of a collective-bargaining agreement." (Pet. at 5-6; emphasis added). This characterization of the holding of the Court of Appeals is likewise inaccurate, in that it implies that the "working conditions" applicable to Malia when he was a member of the bargaining unit are somehow involved in this case. The critical term of Malia's oral contract for a managerial position with RCA – the right to reinstatement – is not, by definition, a "working condition" under the collective bargaining agreement. The right to reinstatement plainly was a condition of Malia's managerial posi-

[2]The citations "Pet. at ____" refer to RCA's Petition for a Writ of Certiorari.

tion, not of his former position within the bargaining unit. Accordingly, the crux of the Court of Appeals decision, as stated by the Court itself, was:

> [B]ecause we construe Malia's Complaint as alleging a state-law breach of contract claim *based on an oral employment contract* we conclude that that claim and Malia's state-law tort claims, which derive from the breach of the oral contract, are independent of and do not interfere with the Local 178 collective-bargaining agreement.

Malia v. RCA Corp., 794 F.2d 909, 913 (A9) (emphasis added).

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court of Appeals Fully Considered and Correctly Decided the Preemption Issue

In deciding this case, the Court of Appeals expressly applied the standard enunciated by this Court in *Lueck*. The Court of Appeals quoted this Court's ruling that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim or dismissed as pre-empted by federal labor-contract law." *Malia*, 794 F.2d at 911 (A5) (*quoting from Lueck*, 471 U.S. at 220). Although it found the state-law claim asserted in *Lueck* to be pre-empted,[3]

[3]In *Lueck*, an employee brought a tort action in state court alleging bad faith in the handling of his claim under a disability plan provided by a collective bargaining agreement. The court ruled that a claim arising from the *handling* of a disability claim was "tightly bound" with the *right* to receive disability payments provided in the collective

this Court emphasized the "narrow focus" of its conclusion, stating that "we [do not] hold that every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Lueck*, 471 U.S. at 220.

RCA ignores this admonition by arguing that merely because (a) the collective bargaining agreement mentioned reinstatement (although only in the context of seniority rights); and (b) the claim for reinstatement stemmed from an agreement between an employer and an employee (although a private agreement for a managerial position), Malia's claims, without more, necessarily are pre-empted. Specifically, RCA contends that the following provision in the collective bargaining agreement provides a right of reinstatement and that Malia should have pursued that right under the grievance procedure provided in the agreement:

> Paragraph 56.04 SENIORITY PRIVILEGES FOR EMPLOYEES WHO ARE TRANSFERRED OUT OF THE BARGAINING UNIT: When an employee has established seniority privileges in an occupational classification within the Bargaining Unit and is or has been thereafter transferred or promoted to another position which is not within the Bargaining Unit, *in the event such employee is again restored to a position within the Bargaining Unit,* such employee shall be deemed to have retained but not accumulated seniority privileges within the Bargaining Unit in accordance with Article 56,

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bargaining agreement and therefore was pre-empted. *Lueck*, 471 U.S. at 216. In the instant case, as discussed *infra* at 6, the collective bargaining agreement provided no right to reinstatement.

> provided that the privilege of returning to the Bargaining Unit shall be extended to all employees so affected. All employees who are on layoff from the occupation in which such employee holds seniority at the time of the return of such employee to the Bargaining Unit, shall be offered recall before such employee regardless of seniority. However, the employees to whom this provision shall apply shall not exceed in any year the proportion of one (1) such employee to each fifty (50) employees included in the Bargaining Unit. It is understood that present employees who have transferred out of the Bargaining Unit prior to November 19, 1973, shall retain all of their accumulated seniority acquired prior to such date (emphasis added).

The Court of Appeals rejected RCA's argument, finding that, upon "a careful reading" of this provision, it did not create any *right* to be reinstated but instead specified seniority rights "in the event such employee [one with seniority privileges] is again restored to a position within the Bargaining Unit." *Malia,* 794 F.2d at 912 (A6-7). This finding by the Court of Appeals was correct and, indeed, was compelled by the plain language of the collective bargaining agreement.

RCA, in its Petition, repeatedly notes that the Court of Appeals relied upon a "careful reading" of the collective bargaining agreement to find that Malia's claims were not preempted. RCA thereby attempts to create the impression with this Court that the Court of Appeals impermissibly interpreted the collective bargaining agreement in order to resolve Malia's claim to reinstatement. RCA confuses the appellate court's examination of the collective bargaining agreement for the purpose of determining

whether the agreement embraces a particular claim with an examination of the collective bargaining agreement for the purpose of determining the merits of the claim under the agreement. In every case in which preemption is asserted, a review of the collective bargaining agreement necessarily must be made to determine whether the sweep of the agreement extends to the asserted state-laws claims so as to pre-empt them. This preliminary exercise, however, is entirely distinct from *resolving* a claim which is "inextricably intertwined with consideration of the terms of the labor contract." *Lueck,* 471 U.S. at 213. In sum, the Court of Appeals did scrutinize the collective bargaining agreement, but only – and quite appropriately – to determine whether Malia's claim to reinstatement was within the scope of the agreement.

Moreover, to adopt RCA's interpretation would have left an arbitrator under the grievance procedure with no standards whatsoever by which to assess Malia's claim of entitlement to reinstatement. In effect, RCA would place Malia in a "no-man's land" under the collective bargaining agreement and, at the same time, would deny him the right to assert in state court a claim outside the collective bargaining agreement. In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), this Court rejected such a tactic. In that case, a group of replacement employees brought suit in a Kentucky state court alleging misrepresentation and breach of contract. The replacement employees had been promised permanent jobs and had been expressly assured that they would not be fired to accommodate returning strikers. The employer and the union settled the unfair labor practice case before the NLRB and the employer laid off the replacements to make room for the returning strikers. The Kentucky Court of Appeals held that the replacement employees' claims were not pre-empted by the National

Labor Relations Act. This Court agreed, finding that the replacement employees' claims were of only peripheral concern to the Act and were deeply rooted in local law. The Court said:

> We find unacceptable the notion that the federal law on the one hand insists on promises of permanent employment if the employer anticipates keeping the replacements in preference to returning strikers, but on the other hand forecloses damages suits for the employer's breach of these very promises.

Belknap, 463 U.S. at 500.

In the instant case, it is likewise unacceptable for RCA, on one hand, to enter into an employment contract with an employee to induce him to leave a collective bargaining unit and to abandon the benefits of a collective bargaining agreement and then, on other hand, to invoke preemption to deny him a major benefit of his employment contract. In this connection, this Court in *Belknap*, in affirming the Kentucky Court of Appeals' finding of no preemption, observed:

> [The Kentucky Court of Appeals] also noted that the misrepresentation and breach of contract involved nonunion individuals who were not parties to the collective-bargaining agreement between the Union and Belknap.

Id. at 497 n.4.

Similarly, Malia's claims arose at a time when he was a nonunion employee not covered by a collective bargaining agreement; indeed, his claims arose from an agreement which was intended expressly to convert him to a nonunion employee.

Malia's state court claims are even more compelling than the damage claims of the replacement employees in *Belknap*. Here, unlike in *Belknap*, no strike, no alleged unfair labor practice, and no NLRB proceeding is involved. In that case, keeping the replacement employees on the job could have interfered with the return of the striking employees. In fact, the Court limited the replacement employees' remedy to damages, noting that:

> Kentucky may not mandate specific performance of the contract between Belknap and respondents nor may it enter an injunction requiring the reinstatement of respondents as a remedy for fraud if either action necessitates the firing of a striker entitled to reinstatement. To do so would be to deprive returning strikers of jobs committed to them by the national labor laws.

Id. at 511 n.13.

In short, if Malia were to prevail on his state claims, his return to the bargaining unit would have no effect on any interest embraced by the federal labor laws; nor would it be inconsistent with the collective bargaining agreement or discourage settlement of a labor dispute. It would do no more than validate Malia's right to assert claims deeply rooted in local law, for Pennsylvania has no less of a "substantial interest in protecting its citizens from misrepresentations that have caused them grievous harm" than did Kentucky in *Belknap*. *Id.* at 511.[4]

[4] *Belknap* was only one in a line of cases in which vital local interests were recognized as paramount. In *Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 503 (1984), the Court stated:

> [A]ppropriate consideration for the vitality of our federal system and for a rational allocation of functions belies any easy inference that Congress intended to deprive the States of their ability to retain jurisdiction over such matters. We

In the final analysis, this case is simply one of many which have emerged from the myriad of employment relationships to which the lower courts have applied, and will continue to apply, the legal standards enunciated in *Lueck* and predecessor decisions. The Court of Appeals correctly applied those standards here and, accordingly, this case presents no important question for review.

II. No Conflict of Authority Exists Among the Circuit Courts of Appeals

Granting review in this case would not resolve a conflict among the Circuit Courts of Appeals, for no conflict exists. RCA argues that the appellate decisions are in discord on the issue of whether "a *unionized* employee may negotiate a private agreement concerning his *working conditions*, which is enforceable under state law" (Pet. at 10; emphasis added). Before turning to the appellate decisions which RCA argues are in conflict, it should be reiterated that the above-quoted statement of the issue is *not* the issue in this case since: (1) Malia is not a unionized employee but rather is a managerial employee; and (2) Malia did not negotiate a private agreement concerning his working conditions for a job subject to a collective bargaining agreement but rather for a managerial job. In short, RCA has not articulated an issue presented by the facts of this case as to which any Court of Appeals has rul-

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have, therefore, refrained from finding that the NLRA pre-empts state court jurisdiction over state breach of contract actions by state replacements, Belknap, Inc. v. Hale, 463 U.S. 491 (1983), state trespass actions, Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 (1978), or state tort remedies for intentional infliction of emotional distress, Farmer v. Carpenters, 430 U.S. 290 (1977) (parallel citations omitted).

ed in contradiction of the Court of Appeals for the Third Circuit in the instant case.

In the cases decided by the Courts of Appeals for the Ninth, Eleventh, Fifth and Sixth Circuits which RCA states reflect a "position" different from the Courts of Appeals for the Third and Eighth Circuits, the plaintiffs were members of a union and held (or had been discharged from) jobs subject to a collective bargaining agreement at the time their respective claims arose.[5] None of the plain-

[5] *Bale v. General Telephone Co.*, 795 F.2d 775, 777 (9th Cir. 1986); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468, 1470 (9th Cir. 1984); *Truex v. Garrett Freightlines*, 784 F.2d 1347, 1349 (9th Cir. 1985); *Evangelista v. Inlandboatmen's Union of the Pac.*, 777 F.2d 1390, 1393 (9th Cir. 1985); *Carter v. Smith Food King*, 765 F.2d 916, 918 (9th Cir. 1985); *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1221 (11th Cir. 1985), *cert. denied*, 106 S.Ct. 863 (1986); *Eitmann v. New Orleans Public Serv. Inc.*, 730 F.2d 359, 360 (5th Cir. 1984), *cert. denied*, 469 U.S. 1018 (1984); *Martin v. Associated Trucklines, Inc.*, 801 F.2d 246, 247 (6th Cir. 1986). Only the plaintiff in *Redmond v. Dresser Industries, Inc.*, 734 F.2d 633, 634 (11th Cir. 1984) does not fit this pattern. In *Redmond*, the plaintiff was promoted from a bargaining unit job to a supervisory job at a time when the collective bargaining agreement negotiated by the UMW provided for the return of such an employee to his former bargaining unit job. A subsequent collective bargaining agreement between the employer and a different union limited this right of reinstatement to employees who had occupied supervisory positions for less than six months. After twelve years in the supervisory position, Redmond was laid off and the company refused to reinstate him in his bargaining unit job. Redmond brought suit for, *inter alia*, breach of contract and fraud. The District Court held that Redmond's claims were pre-empted and the Eleventh Circuit affirmed, finding that the plaintiff's claims derived from his layoff and "the company's subsequent refusal to reinstate him to a bargaining unit job *in accordance with the UMW collective-bargaining agreement*". *Redmond*, 734 F.2d at 635 (emphasis added). The Court concluded that: "This case clearly presents a suit for violation of a contract between an employer and a labor union representing employees and therefore falls within § 301 LMRA." *Id.* In short, the Third Circuit in the instant case correctly distinguished *Redmond* on the ground that it involved a suit based on a collective bargaining

tiffs in those cases asserted a claim, as Malia is here, which arose from an agreement for employment in a non-union managerial position. Not surprisingly, therefore, the Courts of Appeals in those cases held that the plaintiffs' state claims were pre-empted. Those decisions, however, are not in conflict with the Third Circuit's decision in the instant case inasmuch as they involved materially different facts.

Apart from distinguishing *Eitmann v. New Orleans Public Service Inc.*, 730 F.2d 359 (5th Cir. 1984), on its facts, the Fifth Circuit's analysis in that case warrants further comment. In *Eitmann*, the plaintiff was a union member who sued his employer under state law for breach of an oral employment contract entered into at the time he was hired concerning discharge in the event of disability. The Fifth Circuit held that the plaintiff's claim was pre-empted even though he was seeking to enforce an individual contract separate from the collective bargaining agreement. The basis for this holding was the Court's finding that a dispute with regard to company practices, policies or customs that are not explicitly covered by a collective bargaining agreement may nonetheless be subject to the contractual grievance procedure. *Eitmann*, 730 F.2d at 363. RCA asserts that *Eitmann* cannot be reconciled with the Third Circuit's decision here because the Third Circuit "would permit unionized employees to negotiate employment contracts with respect to working conditions left open by a 'careful reading' of the applicable collective-

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agreement. *Malia*, 794 F.2d at 913 n.4 (A8). Thus, contrary to RCA's assertion (Pet. at 14), the *Redmond* decision does not reflect a position of the Eleventh Circuit which is incompatible with that of the Third Circuit. Simply stated, the collective bargaining agreement here, unlike those in *Redmond,* contained no provision granting any right to reinstatement.

bargaining agreement", while the Fifth Circuit would not. (Pet. at 15).

Significantly, the Fifth Circuit in *Eitmann* found support for its analysis in this Court's recent decision in *Belknap, Inc. v. Hale,* 463 U.S. 491 (1983), discussed *supra* at 7. Specifically, the Fifth Circuit stated:

> *Belknap* provides some guidance but is not dispositive of the case before us. The Court was not there presented with a situation in which *employees who were covered by a collective bargaining agreement* sought to bring an action on an alleged separate contract.

Eitmann, 730 F.2d at 364 (emphasis added).

Thus, the Fifth Circuit itself recognized the critical fact applicable to Malia and to the plaintiffs in *Belknap* which distinguishes them from the plaintiff in *Eitmann:* Malia and the plaintiffs in *Belknap* were not "employees covered by a collective-bargaining agreement" who were seeking to bring an action on an alleged separate contract. Here, Malia's claim arose while he occupied a managerial position and in *Belknap* the plaintiff replacement workers were never subject to any collective bargaining agreement. Also, it should be noted that it appears from the opinion in *Eitmann* that the Fifth Circuit conducted a "careful reading" of the collective bargaining agreement there involved, as did the Third Circuit here. In both instances, such a reading was required to determine whether the subject matter of the plaintiffs' respective claims were within the scope of the applicable collective bargaining agreement.

As for the Eighth Circuit's decision in *Anderson v. Ford Motor Co.,* 803 F.2d 953 (8th Cir. 1986), it does not reflect

a "position" in conflict with four other circuits as RCA urges. In *Anderson,* the Court expressly applied the standards enunciated by this Court in *Lueck* and concluded that the plaintiff's state claims were not derived or implied from a collective bargaining agreement. *Anderson,* 80 F.2d at 856, 857.

Moreover, RCA mischaracterizes *Anderson* as representing the "position" of the Eighth Circuit. The *Anderson* opinion itself referred to earlier decisions of the Eighth Circuit in which state claims had been held pre-empted under *Lueck* (*i.e., Bell v. Gas Service Co.,* 778 F.2d 512 (8th Cir. 1985); *Hillard v. Dobelman,* 774 F.2d 886 (8th Cir. 1985)), and under this Court's decisions prior to *Lueck (i.e., Moore v. General Motors Corp.,* 739 F.2d 311 (8th Cir. 1984), *cert. denied,* 471 U.S. 1099, (1985). *Anderson,* 803 F.2d at 957.[6] In short the majority in *Anderson* observed that "in *Lueck*. . .the Supreme Court directed that the determination of whether preemption is required must be made on a case-by-case basis" (*Id.*) and proceeded to find the plaintiffs' state claim not pre-empted. Furthermore, even the dissenting opinion in *Anderson,* upon which RCA relies, *supports* Malia's position here. For Judge Bright noted that the plaintiffs' claims in *Anderson* were not analogous to those asserted

[6]That *Anderson* does not reflect any "position" of the Eighth Circuit on preemption but is only one of many decisions applying *Lueck* is further demonstrated by the Eighth Circuit's decision in *Johnson v. Hussman Corp.,* 805 F.2d 795 (8th Cir. 1986). In that case, the Court held that a unionized employee's state-rooted claim of retaliatory discharge was pre-empted. Circuit Judges McMillan and Bowman were on the panels in both *Anderson* (decided on October 23, 1986) and *Johnson* (decided on November 17, 1986). Thus, the Eighth Circuit's decision in *Anderson* does not represent any "position" of the Eighth Circuit at odds with any decision in any other circuit on the same facts.

in *Belknap,* discussed *supra* at 7, in which this Court found no preemption. Judge Bright cited the fact that the replacement workers in *Belknap* were not covered by the collective bargaining agreement and had no remedy under it. The same is true of Malia here.

In sum, there is no conflict among the Circuit Courts of Appeals on the issue raised by the facts of this case. RCA has confused the appellate courts' reaching varying results in labor preemption cases, which indeed *Lueck* contemplated, with the courts' applying different legal standards. The conflict asserted by RCA, at bottom, is artificial and reflects RCA's refusal to recognize the significance of the fact that Malia's claims are not predicated even indirectly on any collective bargaining agreement and that they did not arise while he was subject to any collective bargaining agreement.

III. The Result of This Court's Review of the Decision in *William v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir. 1986), *Cert. Granted*, 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526) Will Have No Effect on This Case

RCA contends that this Court granted certiorari in *Williams v. Caterpillar Tractor Co., 786 F.2d 928 (9th Cir. 1986), cert. granted,* 55 U.S.L.W. 3357 (U.S. November 17, 1986) (No. 86-526) in order to decide "whether an employee who is covered by a collective-bargaining agreement can enforce under state law a private employment agreement allegedly negotiated with his or her employer" (Pet. at 7-8). This contention, Malia submits, is without merit for two reasons. First, the question presented in *Williams* was whether so-called "complete preemption" under § 301 of the Labor-Management Relations Act ap-

plied to the circumstances of that case (which circumstances are not present in the instant case) so as to permit the removal of the employee's state claims to federal court. In short, the central issue in *Williams* is the propriety of removal under Section 301 on the basis of the facts in that case. Here, removal under Section 301 is not an issue since, as RCA concedes, it has an alternative basis for removal, *i.e.,* diversity of citizenship (Pet. at 9).[7]

Secondly, the instant case does *not* raise any issue pertaining to "an employee who is covered by a collective-bargaining agreement." Unlike the breaches of the promises made to the employees in *Williams,* the breaches of Malia's agreement applicable to his managerial position occurred when he was not protected by or subject to any collective bargaining agreement and when he was not even a member of the union. Furthermore, in *Williams* the collective bargaining agreement did contain provisions governing the subject matter of the employees' state claims — plant closure, transfer and termination. As found by the Court of Appeals in the instant case, no provision in the collective bargaining agreement established any right to return to a position in the bargaining unit.

Most importantly, the crux of the employer's argument in *Williams* is that the employee's private agreement for permanent employment (assuming satisfactory performance) was "merged" into a collective bargaining agreement which covered the employees *after* they had returned to the bargaining unit. RCA asserts that "the instant case

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[7]It is significant to note that the decision of the Court of Appeals for the Ninth Circuit which RCA claims states the "position" of that Circuit on preemption (*Bale v. General Telephone Co.,*) refers to *Williams* solely in the context of removal. *Bale,* 778 F.2d at 778. *Bale* was decided only three months after *Williams.*

also raises this issue, since RCA's preemption argument rests on the premise that *any* oral agreement between Malia and RCA would be subsumed by the Local 178 labor agreement." (Pet. at 9; emphasis added). However, in contrast to the employees in *Williams,* Malia's agreement for a managerial position has not been merged into any collective bargaining agreement to which he *subsequently* became a party. Indeed, by this litigation Malia is seeking to *become* a party to the existing Local 178 agreement.

RCA, in fact, is seeking to expand the scope of preemption far beyond the boundaries set in *Lueck.* RCA argues that:

> [T]he reasons supporting preemption are even stronger in this case than in *Williams,* since Malia still belonged to the bargaining unit at the time he supposedly reached his private agreement with supervisor May, and, thus, was still represented by Local 178 in all matters concerning the terms and conditions of his employment.

Pet. at 9.

This argument, if valid, would mean that Local 178, as Malia's representative, should have negotiated the terms and conditions of Malia's employment in a managerial position outside the bargaining unit – a most unusual role for a union, to be sure. In short, RCA's argument rests on a premise for which there is no precedent and which, in effect, would force a union employee to quit his job, resign from the union, and *then* take his chances on obtaining a position outside the bargaining unit. Thus, contrary to RCA's assertion, a reversal by this Court of the Ninth Circuit in *Williams* would not undermine the Third Circuit's holding that Malia had the power to negotiate a private

agreement with RCA enforceable under state law. Malia, like any employee, had the inherent right to negotiate a private agreement for a position *outside the bargaining unit.*

Finally, RCA urges this Court to withhold a ruling on its petition "until *Williams* has clarified the governing law." The "governing law" on labor preemption (apart from the removal issue presented in *Williams*) needs no clarification; the standards set by this Court in its unanimous decision in *Lueck* are clear and workable. The problem which RCA has is not with any lack of clarity in the governing law but rather is with the result of the law's application to the facts of the instant case. Accordingly, RCA's Petition presents no important issue for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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